

**Class Watch Strap Company, Inc. and Local 1,
Leather Goods, Plastics, Handbags, and Novelty
Workers Union. Case 2-CA-17805**

23 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 9 August 1982 Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Class Watch Strap Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

¹ In finding the discharges of Milton Vargas and Tomas Merced violative of Sec. 8(a)(3) and (1) of the Act, the Administrative Law Judge determined that Respondent's asserted reasons for their discharges were pretexts. In these circumstances Member Jenkins finds it unnecessary to rely on *Wright Line*, 251 NLRB 1083 (1980).

² We shall modify the Administrative Law Judge's recommended Order so as to require Respondent to expunge from its files any reference to the unlawful discharges of Milton Vargas on 10 December 1980 and Tomas Merced on 19 December 1980, and to notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982).

Additionally, in his recommended remedy, the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate. Accordingly, we shall substitute the phrase "in any like or related manner," for "in any other manner" in the recommended Order and notice.

2. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharges of Milton Vargas on 10 December 1980 and Tomas Merced on 19 December 1980 and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees regarding their membership in, or sympathies or activities on behalf of, Local 1, Leather Goods, Plastics, Handbags, and Novelty Workers Union (Local 1), or any other labor organization.

WE WILL NOT discharge any of our employees because they support Local 1, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Milton Vargas and Tomas Merced immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole, with interest, for any loss of earnings they may have suffered because of our discriminatory conduct against them.

WE WILL expunge from our files any references to the discharges of Milton Vargas on 10 December 1980 and Tomas Merced on 19 December 1980, and WE WILL notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

CLASS WATCH STRAP COMPANY, INC.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was tried before me in New York, New York, on March 8, 1982; the amended complaint, upon which the hearing is based, issued on May 5, 1981; the underlying unfair labor practice charge was filed on January 30, 1981, by Local 1, Leather Goods, Plastics, Handbags, and Novelty Workers Union, herein called the Union. The amended complaint alleges that Class Watch Strap Company, Inc., herein called Respondent, discharged, and failed and refused to reinstate, employee Milton Vargas on or about December 10, 1980,¹ and employee Tomas Merced on or about December 19, due to their activities on behalf of the Union. The amended complaint also alleges that on or about December 17 and 18 Respondent, by its president, Pearl Seidler, interrogated its employees regarding their activities on behalf of the Union. Respondent, in its answer, admits that it discharged Vargas on December 10 and Merced on December 19, but defends that the discharges were caused by their inadequate work performance and other stated reasons, rather than their activities on behalf of the Union. Respondent's answer also denies the alleged interrogation.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its office and principal place of business located in the city of New York, is engaged in the manufacture and nonretail sale of leather watch straps. Annually, Respondent derives gross revenues in excess of \$500,000 and purchases and receives at its New York City facility products, goods, and materials valued in excess of \$50,000, which were delivered to it directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent, in its answer, denies knowledge or information that the Union is a labor organization within the meaning of Section 2(5) of the Act. The uncontradicted testimony of Miguel Garcia, organizer for the Union, is that its representatives bargain with employers, it has collective-bargaining agreements with employers, processes grievances, and exists for the purpose of representing employees for the purpose of collective bargaining with their employers. I therefore find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent manufactures watch straps; in that regard, two pieces of leather are chopped on a chopping machine; one is placed upon the other and they are sewed

together. A number of these straps are then laid together in a line on a board and sprayed by cement from a spray gun held and operated by an employee. The straps are then removed from the board, rechopped, and finished with a loop and painted.

Vargas began his employ with Respondent on November 12. As was true of Merced, and most of Respondent's employees, Respondent obtained Vargas through an employment agency. When he arrived at Respondent's premises he spoke to Seidler; she asked him if he was left- or right-handed and he said that he was left-handed. Seidler informed Vargas that most of the machines in the shop were meant to be operated by right-handed people and that left-handed employees would have some difficulty operating them. However, Seidler testified: "I liked the way he talked, the way he presented himself" and she hired him. She then showed him samples of watch straps that he would be making and introduced him to one of the foremen, Joseph DeBono, to teach him his job. DeBono spent approximately a half hour explaining the job to Vargas, who had no previous experience with the work involved.

Vargas' job was to bind the leather straps together with cement from a spray gun. "Like a gun throwing cement" is how Vargas described it in his testimony. Although he testified that Seidler told him that the job was more difficult for someone left-handed, "the pistol that I used, I could have used it with any of my hands," although he used his left hand in operating it.

Seidler testified that the importance of a right-handed employee in this area was:

Well, putting straps on the board must be done straight. If it is done on an angle the strap will come out on an angle; instead of having a straight strap, you'll have a strap that curves like this here on an angle. So it must be done straight, and that's why we always hire righthanded boys or girls.

She also testified that the spraying booth job (the one Vargas was assigned to) is a difficult job, "especially if you are lefthanded." Respondent previously employed a left-handed person in this job classification, but for "not too long" a period because of poor performance.

Merced began his employment with Respondent on November 19;² he worked on the chopping machine: This is the first step in the operation, which cuts the straps out of a larger piece of leather. Additionally, Merced made deliveries for Respondent.

On December 10, Vargas and Merced were entering the building in which Respondent is located on their way to work. At that time Garcia stopped them and told them of the benefits they could receive if the Union represented them. Garcia then gave authorization cards to Vargas, Merced, and to "an American girl" (who was never further identified although Vargas testified that she was employed by Respondent). Vargas signed the card and immediately returned it to Garcia; Merced told Garcia that he would keep the card, sign it, and return it

¹ Unless otherwise indicated, all dates herein relate to the year 1980.

² He testified that he began on November 14, but payroll records indicate that his employment with Respondent commenced on November 19.

to Garcia at a later time.³ Vargas, Merced, and "the American girl" then entered the elevator to take it to the ninth floor where Respondent is located. While the elevator was on the way up, "the American girl" tore up the authorization card Garcia had given her; Merced asked her if she did not agree with the Union and she made a gesture with her mouth like she did not agree with the Union. Vargas testified that when he, Merced, and "the American girl" exited from the elevator she walked toward the office.⁴

The Vargas' Discharge

Vargas testified that after signing the union card he reported to his work location and began performing his work; sometime before lunch, Joan Bach, Respondent's bookkeeper, called him into the office, gave him a check,⁵ and told him "that the work was slow." That was all that was said to him; he said nothing, left the premises, and has not been employed there since.

Respondent admits that it discharged Vargas on December 10. It denies any knowledge of his signing a card for the Union and alleges that he was discharged for poor work quality, tardiness, and absences from work without a doctor's note.

Bach testified that, sometime on the afternoon of December 10, Seidler told her that "it wasn't working out" with Vargas; "that his work was not satisfactory. That she had to let him go" and asked Bach to prepare his paycheck. Shortly thereafter, Seidler left the premises for the remainder of the day and Bach prepared his final paycheck for Monday, December 8, through Wednesday, December 10. Shortly before 5:15,⁶ she went into the factory and asked Vargas to come with her to the office. When they reached the office, she told Vargas that she was sorry, but that it was not working out. Vargas took the check and left without saying anything.

The working hours for Respondent's production employees are 8:30 a.m. to 5:15 p.m. with a 45-minute lunch break. Vargas' timecards establish that, of the 17 days he was actually employed, he was late arriving to work on four occasions; once by 3 minutes, 9 minutes, 11 minutes, and once by an hour and 42 minutes.⁷ Vargas testified that he was late for work "a few minutes during the week because of the train," but he was never warned that if his lateness continued he would be disciplined or discharged.

On Friday, November 28, Vargas was feeling ill. He testified that, when he informed his supervisor, Joseph

DeBono, of this, he was told if he was ill he could go home, but he was not told then, or any time previously, that if he were out sick he had to bring a doctor's note upon his return. When he returned to work, on Thursday, December 4,⁸ Seidler simply asked him why he did not call Respondent, he apologized, and returned to work; he testified that neither Seidler nor DeBono asked him for a doctor's note upon his return to work on December 4, or ever instructed him to obtain one when he was out ill.

DeBono testified that, when Vargas left work on November 28, he did not know that he would not see him again at work until December 4, but when he said that he was leaving because he did not feel good, DeBono told him to bring in a doctor's note when he returned to work. When Vargas returned on December 4, he told him to see Seidler in the office, but he (DeBono) did not speak to him about his absence. Seidler testified that on November 28 DeBono informed her that Vargas had complained of being ill and had left work and would return on Monday. When he returned to work on December 4, he came to see Seidler early in the morning and said that he could not find his timecard. Seidler told him that she had removed his card because she had not heard from him and assumed he was not coming to work. Vargas told Seidler that he had been very sick; Seidler asked him for a doctor's note and he said that he did not have one; Seidler said that if he were so ill he had to go to a doctor. He said that he would bring one at a later time and that he needed the job. Seidler put him back to work. Seidler testified that she never informed Vargas that if he were out of work for illness he had to bring in a doctor's note, but that her foreman did.

Seidler and DeBono also testified as to the poor quality and quantity of Vargas' work. DeBono testified that when Vargas was hired he instructed him on the operation of the spray gun and the spray booth;⁹ shortly thereafter, he told Vargas on a daily basis to try to work faster and, in the first 2 weeks, there was a little improvement in his speed. DeBono testified that after the first few weeks, "he got a little better," but, by December 10, his work was "unsatisfactory. He wasn't doing anything. He wasn't producing. He was just like this—staring." On December 10, he again told Vargas to work more quickly, but "when I go near him he works. But when I leave, he stares." As to the quality of Vargas' work, DeBono testified:

Q. Forget about faster or slower. But the work that was turned out, was that satisfactory?

A. The last week he was there, yes.

Q. He was what?

A. The last week he worked there—I mean—the last week he worked there. I don't mean from Monday to Friday. The last week overall.

Q. Yes?

A. It was unsatisfactory.

³ Merced returned his signed card to Garcia the following day.

⁴ Although Vargas did not know where, at Respondent, this woman was employed, he frequently saw her with Seidler.

⁵ December 10 was a Wednesday; Respondent's employees are paid on Tuesdays for the preceding pay period, which is Monday through Friday. Bach testified that on many occasions in the past employees were discharged prior to the end of a pay period.

⁶ Vargas' timecard supports Bach's testimony that this occurred at or about 5:15, not before lunch, as Vargas testified to. Bach testified she spoke to Vargas, slowly, in English. At the hearing, Vargas testified with the use of an interpreter, although he clearly understood some English.

⁷ Bach testified that the reason she considered lateness important is that Respondent has an alarm that is activated when anybody enters the factory after 8:30 a.m., and when this alarm goes off everybody stops working and looks to see who it is. She arrives for work at 9 a.m. and, presumably, the alarm is activated when she walks in.

⁸ Vargas did not telephone Respondent on either December 1, 2, or 3 that he would not be at work on those days.

⁹ DeBono estimated that being left-handed slows down work on this job about 30 percent.

Q. Not satisfactory?

A. Right.

DeBono further testified that during the 2-week period prior to November 28, Vargas' work was "not really good, but he's fairly [sic]. That means I was not really satisfied," and that Vargas' work was improving (for a left-handed employee) and that Vargas was trying, and he informed Seidler, on a daily basis, that Vargas' work was fairly good. DeBono also testified that, in his daily discussions with Seidler, he informed her that having a left-handed employee had a severe impact on his production, "but she wants to keep him."

Seidler testified that she was in the factory area on a daily basis observing the employees' work and, in this regard, she observed that Vargas work had slowed down and that he was not placing the straps straight on the board; she had one of the other employees, and DeBono, work with him so that the straps would be straight. Prior to November 28 she noticed that Vargas was staring into space and not concentrating on his work; she asked him what was wrong and why he could not do his work. Vargas told her that nothing was wrong. She never informed him that if his work did not improve he would be discharged. Prior to November 28, Vargas "was a fair worker. He wasn't the best, but he was fair. And we were busy at that time and we were willing to give him the chance" After Vargas returned on December 4, "He just couldn't work. He wasn't producing. He wasn't keeping up with it—He wasn't concentrating and he was staring most of the time into space."

Seidler further testified that early in the afternoon of December 10 she asked Vargas why he was not concentrating on his work and what was wrong; he answered that nothing was wrong. After this conversation she examined Vargas' timecards¹⁰ and told Bach to take out his timecard and pay him for a full day, that she was discharging Vargas because he was not concentrating or doing his work correctly.

Vargas testified that, during his employment at Respondent, no member of management ever complained to him about the quantity or quality of his work, nor was he told that if the quantity or quality of his work did not improve he would be discharged.

Merced

As stated, *supra*, Merced signed, and returned to Garcia, the union authorization card on December 11. He testified that about 2 or 3 days later Seidler called him into her office (nobody else was present). She asked him how he liked his job and Merced said that it was all right although it did not pay much. Seidler then asked him what the people downstairs wanted with him. Merced said that they were "from some kind of union" and Seidler asked him if they gave him anything to fill

out. He said that they gave him a card; she asked if he filled it out and he said no, that he had taken it home. Seidler then asked Merced what they said to him. He answered that they explained about the benefits the Union could obtain. Seidler asked him if he were going to join and Merced answered that he had not been employed by Respondent long enough to be thinking of joining a union. Seidler then told him that if he asked any of the other employees he would learn that they do not want one because they do not want union dues deducted from their paychecks. Seidler ended the conversation by telling Merced that he should inform her on the next occasion that he is approached by the Union.

Merced testified that, on December 18, he felt ill at home, but reported to work solely to return Respondent's delivery book, which he had taken home with him the previous day. When he arrived at the office he gave Seidler the delivery receipt book and told her that he was too ill to work and only came to the shop to return the delivery book.¹¹ While in Seidler's office, she asked him what he thought of the Union and he said that he felt that everybody has the right to organize; Seidler asked if that meant that he was thinking of joining the Union and he said that he did not say that, because he had not been employed at Respondent for a long enough time. Seidler then touched Merced's hand and said that he did not look sick; he said that he was, and if he stayed he would not be able to perform his work the way he was supposed to, and Seidler told him that, in that case, he should go home. Seidler testified that she never questioned Merced about his activities on behalf of, or membership in, the Union.

Merced testified that after the above-mentioned absence from work on Thursday, December 18, he came to work the next morning and could not locate his timecard. He went to the office and asked Seidler what happened to his timecard; she told him not to worry, that he should return to work and she would make him another one and commented that his health had improved very quickly. He went to work on his machine in the shop and making deliveries. At or about 4 p.m. Seidler called him into her office and told him that she had been checking his work record and would have to let him go. Merced asked what was wrong with his work record; he had been absent the prior day, but he was ill. Seidler simply gave him his check and he left. Merced testified that he believes that December 18 was the only day he was absent from work. (His timecards show that he was also absent on November 27.)

Seidler testified that, when Merced came into her office on the morning of December 19, he told her that his timecard was not in the rack. She told him that since he had the flu the previous day she felt that he would not be at work that day. He said that he felt better that day and needed the job, "and again feeling sympathy towards him, and we needed him, I gave him the job back." Seidler asked Merced if he had gone to see a doctor and he said he had not because he could not afford to see one. Seidler then testified that at this point

¹⁰ This came in answer to the leading question: "After that conversation . . . did you examine his timecards?" The testimony, in this area, ended at that point, and Seidler never testified as to what, if anything, of substance she learned from Vargas' timecard. It is possible that Seidler confused Vargas with Merced, as there is more substantial testimony, *infra*, regarding Seidler checking Merced's timecards, prior to discharging him.

¹¹ Seidler's testimony of this conversation conforms with that of Merced, up to this point of the conversation.

she checked Merced's timecards. When asked what caused her, at this time, to examine Merced's timecards, she testified: "Yes, because I saw the way he was working, and I said let me go over his records and everything and let me see"; "Because he couldn't finish the work that the foreman was giving him"; "Because observing his work, and what the foreman was telling me, he was not producing. He was not working. Whatever work we gave him he could not do. He could not even finish the little bit of work that we gave him. And he always had headaches in the afternoon." When I asked what his timecard would show, Seidler testified: "I wanted to check how many days he took off, or mornings or afternoons" and "I decided on the way he was working that day. On that particular day I decided to look at his timecards to see how he was doing—how many times he came in late—his excuses that he told me for coming in late, and his excuse for leaving early that one time."¹²

Seidler testified that the information on Merced's timecards was a factor in her decision to terminate Merced.¹³ At or about 5:15 p.m., Seidler called Merced into her office, told him that his production was very slow and she was not satisfied with his work; she had thought it over and after checking Merced's timecards she decided it was best to let Merced go. Seidler testified that Merced only said that he thought Seidler was very nice, shook her hand, and left the premises.

As was true of its defense to the Vargas' discharge allegation, Respondent contends that Merced's discharge was due to his latenesses and absences, without a doctor's note, and the poor quantity and quality of his work.

Merced's timecards establish that, of the 22 workdays of his employment with Respondent, he was absent on that 1 day, December 18, *supra*, and November 27, and was late on five occasions¹⁴ (not including his first day of employment with Respondent) for 2, 3, 7, 28 minutes, and an hour and 13 minutes. Merced testified that no member of Respondent's management ever informed him that he would be discharged if his latenesses continued. He also testified that when he was hired Seidler did not tell him that he had to be at work on time every day, although "anyway, I understand that I had to be on time." On only one occasion, about the first of December, did Merced give Seidler a reason for being late, and that was not because she asked him for an excuse (according to Merced's testimony), but "because she was there." In addition, he was never informed by Seidler or any other supervisor at Respondent that if he were out ill he had to give Respondent a doctor's note.

DeBono testified that on every occasion when Merced arrived late for work he asked Merced what the problem was; after Merced told him, on each occasion he sent Merced to speak to Seidler, although DeBono never warned him that if his tardiness continued he would be disciplined—"I don't warn people." Seidler testified that she spoke to Merced on every occasion when he arrived

late for work, although she never threatened to terminate him if it happened again.

Merced testified that DeBono never told him that he was not cutting enough leather straps. The testimony of DeBono and Seidler is quite to the contrary. DeBono testified that he instructed Merced on the operation of the chopping machine; he found that the product turned out by Merced was very good, but his work was very slow. Since he felt that it takes about a week to get fully accustomed to the machine he waited and continued to observe Merced's work. Although the quality of the work remained good, the quantity did not improve¹⁵ and he spoke to Merced about this on a daily basis, but there was no improvement. On December 19, as he does every day, he spoke to Seidler about all the employees and told her that Merced was "doing terribly" although Seidler did not inform him that Merced was going to be discharged that day.

Seidler testified that during part of the morning hours and the early afternoon hours she observes the employees' work in the factory. In addition, DeBono, on a daily basis, informs her of the employees' work performance. Prior to December 19, DeBono had often informed her of the deficiency in quantity of Merced's production; on that day, she had not spoken to DeBono about Merced, but had personally observed that he was not completing the orders given him. On the basis of the observation and the other factors discussed, *supra*, she decided to discharge Merced.

Garcia testified that the Union had been soliciting Respondent's employees in front of its premises (on the ground floor) since the latter part of October; commencing at that time, either Garcia together with another union organizer or other union organizers were at the door on the ground floor prior to work, at lunchtime, and at the conclusion of work, handing out union literature and speaking to employees. The cards signed by Vargas and Merced were the only cards the Union obtained by the Union from Respondent's employees.¹⁶

Seidler testified that, at the time of the discharges herein, she had no knowledge that Vargas or Merced was engaged in any activity for the Union and, in fact, had no knowledge that the Union, or any union, was speaking to or soliciting Respondent's employees; DeBono also testified that he knew nothing of the Union's attempt to organize Respondent's employees at the time involved.¹⁷

¹⁵ DeBono testified that during the last week of Merced's employ he told Merced to speed up his work and Merced said that he could not work because he had a headache, and "when I told him you should make double what you do, he started laughing in my face."

¹⁶ Garcia testified that the first occasion when he gave Vargas or Merced leaflets (with authorization cards attached) was December 8 or 9; it was not until December 10 that he first spoke to them about the Union. Garcia explained that since Respondent is located in a large building, it was not until then that he realized that they were employed by Respondent. Merced testified that the first time he saw Garcia, or the other men from the Union, was about a week prior to signing his card.

¹⁷ She arrives for work between 7:15 and 7:45 a.m. The employees are scheduled to begin work at 8:30. DeBono arrives at work at or about 7:30 a.m.

¹² Merced's timecard establishes that on December 10 he left work at 2:24 and did not return until the following morning.

¹³ She testified that these factors were the latenesses recorded on his timecards.

¹⁴ Merced testified that he was late for work "probably a couple of minutes because of the train." His timecards establish that he sometimes arrived for work rather early—10, 20, and as much as 41 minutes early.

Garcia, on rebuttal, testified to some surveillance allegedly engaged in by Bach. In answer to a question as to the activities that he engaged in during "the period relevant herein," he testified (not too clearly):

We gave out leaflets in front of the shop. We gave out cards. We speak to the people from the shop. Especially the people coming outside in the front of the shop—standing over and looking at us. While we was handling the cards. Especially the lady in front here. This lady was standing there while we was trying to organize the shop—

Garcia identifies the woman he was referring to as Bach and testified that she stood in the entrance of the building for about 5 or 10 minutes while they were attempting to speak to employees. While she was there, none of the employees spoke to Garcia.

Bach denied any knowledge of any union organizing Respondent's employees at this time. She testified specifically that in the morning she arrives for work at 9 o'clock after the other employees, so she could not observe any employees being solicited on their way to work. She testified, generally, of "no knowledge of any union" during this period of time.

Also on rebuttal, Garcia testified, "When I was trying to talk to Vargas, a lady was standing by—." When he was asked if it was Seidler or Bach, he testified: "Yes, the boss was passing behind me. And the guy [Vargas], he pointed to me, and he said the boss is coming."

Finally, there is a conflict in the testimony as to when the Union had previously been the representative of Respondent's employees. Seidler, who had not been involved in Respondent's operation until about 1977 when, at her father's death, she assumed the presidency of Respondent, testified that she was not aware that the Union was the collective-bargaining representative of Respondent's employees from 1953 through 1976 or 1977. Respondent's attorney herein, David Engelson, testified that he has been the attorney for Respondent since about 1955 or 1960, and that Respondent had a contract with the Union that expired in 1968, but there were no subsequent contracts with the Union.

I find it unnecessary to make any credibility determinations on this issue as it is not material to the principal issue herein, the discharges of Vargas and Merced.

IV. ANALYSIS AND CONCLUSION

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board set forth the rule to apply in dual motive or pretextual cases such as the instant matter:

First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Respondent's witnesses denied any knowledge of the Union's organizing attempt or the fact that Vargas and Merced signed union authorization cards, and there is no

direct credible evidence to counter this; although Garcia testified vaguely about some surveillance engaged in by Seidler and Bach, I would find this testimony too uncertain to credit, nor would I credit Garcia's testimony that the Union had been soliciting Respondent's employees, daily since late October; I find implausible that, prior to December 10, the Union, which had previously represented Respondent's employees, could obtain no signed authorization cards in 6 weeks from a shop of 22 employees who are paid close to the minimum wage. Rather I would credit Merced's testimony that he first observed the union representatives soliciting the employees approximately a week before he signed his card.

However, even when there is no positive evidence of knowledge by a respondent, it can be imputed to respondent under the small plant doctrine. *Wiese Plow Welding Co.*, 123 NLRB 616 (1959), and *A & Z Portion Meats, Inc.*, 238 NLRB 643 (1978). Some of the factors to consider are the number of employees, the timing of the discharges, whether the procedure used varied from past practice, and whether other employees who were not active for a union were also discharged. On the basis of the above, I find that knowledge of Vargas' and Merced's execution of union authorization cards can be imputed to Respondent. Firstly, unlike the situation in *A to Z Portion Meats, supra*, there was no attempt herein to conceal the Union's organizing attempt; for the week prior to December 10, representatives of the Union had been at the entrance to the building in the morning, at lunchtime, and as the workers were leaving, being conspicuously visible to Respondent's agents. Respondent employed approximately 22 employees at the time—a proper number to come within the purview of this doctrine. Additionally the fact that Vargas was discharged on the same day that he signed a card for the Union, without any prior warning, in the middle of the workweek convinces me that knowledge of Vargas' and Merced's union activity can be imputed to Respondent.

I would next find that the General Counsel made the required *prima facie* showing set forth in *Wright Line, supra*; the discharge occurred on the same day that he signed the authorization card for the Union, it occurred in the middle of a workweek, and was without any prior warning. The determinative question, therefore, is whether Respondent sustained its burden "that the same action would have taken place even in the absence of the protected conduct." Respondent alleges that Vargas was discharged due to his tardiness, his absences without a doctor's note, and the poor quality and quantity of his work. As regards his tardiness, while it is true that he arrived late on 4 of the 17 days that he was actually employed by Respondent, with the exception of the day when he was an hour and 42 minutes late (this occurred 4 weeks prior to his discharge, and he was not paid for this time) the largest period of time that he was late was 11 minutes. Additionally, during this period he usually arrived at work between 10 and 15 minutes prior to the beginning of the scheduled workday.

Admittedly Vargas was absent from work from noon, November 28, through December 3, returning to work on the morning of December 4. DeBono testified that,

when Vargas left on November 28 complaining of being ill, he told him to bring a doctor's note when he returned; Seidler testified that, when Vargas returned on December 4, she asked him for a doctor's note explaining his absence. Vargas denies these allegations. Although neither Seidler nor DeBono was obviously an incredible witness, I would credit Vargas' testimony over theirs where there is a conflict; he appeared to be testifying in an honest and truthful manner, and making concessions in his testimony whenever it was dictated by the truth. Even assuming that Vargas had been instructed to bring a doctor's note, and failed to do so, the fact remains that he was not discharged at that time, and worked the following 5 days, with only a 3-minute lateness. The obvious question is, what was different on December 10 from on December 4?

DeBono's testimony regarding Vargas' work is confusing; at one point he testified that during the first 2 weeks there was a little improvement in his work, and between that time and the time of his discharge "he got a little better" but by December 10 his work was not satisfactory. However, he also testified that he informed Seidler that Vargas' work was fairly good (for a lefty) and that his work was improving and he was trying. Seidler testified that Vargas was a fair worker prior to November 28 and she continued his employment up to that point because business was good; after that point, according to Seidler's testimony, his work deteriorated—"He just couldn't work. He wasn't producing," although she never warned him that unless his work improved he would be discharged.

On the basis of the above, I find that Respondent has not sustained its burden under *Wright Line, supra*. Even if it were true that Vargas' work had not improved, or had gotten worse, since November 28, Respondent never explained why it apparently rushed to discharge him on December 10. Seidler knew that Vargas was left-handed when she hired him; if the quality of his work was poor in the period after November 28, Seidler could have warned Vargas about it or discharged him at that time, rather than precipitously discharging him on December 10, the day he signed the card for the Union. Respondent's discharge of Vargas therefore violates Section 8(a)(3) of the Act.

I would credit Merced's testimony regarding his conversations with Seidler about the Union on or about December 15 and 18. Like Vargas, Merced appeared to be a credible witness attempting to remember the facts as best he could and testifying about them in an open and truthful manner; additionally, I have already found that Respondent was aware of the Union's organizational attempt by December 10; even absent that finding, it is reasonable to assume that they were so aware by December 15, considering that the union representatives were present in front of the building entrance in the morning, at lunchtime, and in the afternoon; Seidler, Bach, or DeBono must have observed them by that time. Seidler's questioning of Merced clearly violated Section 8(a)(1) of the Act. *Struksnes Construction Co.*, 165 NLRB 1062 (1967); *Solboro Knitting Mills*, 227 NLRB 738 (1977), *enfd.* as modified 572 F.2d 936 (2d Cir. 1978); *Wilhow Corp.*, 244 NLRB 303 (1979).

As regards the discharge of Merced, the General Counsel has sustained his burden under *Wright Line, supra*; he was discharged, without warning, 8 days after he signed a card for the Union, and 3 days and 1 day after Seidler had interrogated him about his sympathies for the Union. Again, Respondent has not sustained its burden of establishing that Merced would have been discharged even in the absence of his protected conduct. Between November 19 and December 10 Merced had been absent from work 1 day and had been late arriving at work on four occasions, for 2, 3, 7 and 28 minutes, and yet no action had been taken against him by Respondent. It was not until after he signed a card for the Union and informed Seidler that he had received a card from the Union and that he felt that everybody had the right to organize (although he also told her that he had not been employed at Respondent for a long enough time) that he was discharged. Both Seidler and DeBono daily observed the employees' work, and both testified that Merced was producing a low quantity of watch straps. Yet they never explained why they waited until December 19 (after Merced signed a card for the Union and had been interrogated by Seidler) to discharge him. Respondent has not sustained its burden of demonstrating that Merced's low work production, together with his absenteeism and tardiness, was the reason for his discharge and that he would have been discharged for these reasons even if he had not signed a card for the Union. I therefore find that Respondent's discharge of Merced violates Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by interrogating its employees regarding their union membership, activities, and sympathies.
4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Milton Vargas.
5. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Thomas Merced.
6. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully terminated Milton Vargas and Thomas Merced, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of

earnings suffered as a result of the discrimination by payment of a sum equal to that which they would have earned, absent the discrimination, with backpay and interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁸

The Respondent, Class Watch Strap Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees in regard to their membership in, or sympathies and activities on behalf of, the Union.

(b) Discharging its employees due to their activities on behalf of the Union.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act:

(a) Offer Milton Vargas and Thomas Merced immediate reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or any other rights and privileges, and make them whole for any loss of earnings sustained by reason of the discrimination against them, in accordance with the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents payroll and all other records necessary to determine the backpay due under the terms of this Order.

(c) Post at its place of business copies of the attached notice marked "Appendix."¹⁹ Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."